Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-270

CHARLES GENE HEADS,

Appellant,

V.

STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

MOTION TO DISMISS APPEAL

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STATEMENT OF THE CASE

FACTS

MAY IT PLEASE THE COURT

The appellee, after review of the "facts" as stated by appellant, is mandated to set forth a factual basis which differs in part from that set forth by the appellant.

During the early morning hours of August 22, 1977 the defendant in this case, appellant herein, Charles Gene Heads, shot and killed Roy Leejay.

Several days earlier, the appellant's wife had left him. They had resided together in Houston, Texas, and has several children from the marriage. The appellant's wife left him after he came angrily into the house and began loading a .22 caliber semi-automatic rifle in her presence and making what she took to be threatening remarks toward her. Fearful of him because of prior incidents involving firearms and weapons, she immediately fled the residence. Mrs. Heads spent the night with neighbors and obtained the children the following morning and left for Shreveport, Louisiana, where the offense occurred. Shreveport is some five hours away from Houston by car.

The appellant apparently attempted to locate his wife in Shreveport by making several phone calls to relatives in the area. He also made one trip to Shreveport before the morning of the shooting but upon failing to find his wife, returned to Houston.

Once the appellant had returned to Houston he mowed his grass, washed his cars and played dominoes with several male neighbor friends. He again attempted to locate his wife in Shreveport by telephone and on failing to do so, put his loaded .22 caliber semi-automatic rifle in the trunk of his car and armed himself with a .22 caliber revolver and then began the drive to Shreveport.

Upon arrival in Shreveport the appellant searched for his wife by going to the house of a relative and by calling other

relatives. He determined that his wife was apparently staying with her sister, the wife of the deceased individual in this case, Roy Leejay, and began calling the Leejay residence late at night on August 21 in an effort to speak with his wife. Upon being unsuccessful in getting his wife to speak with him on the phone, the appellant then went to the Leejay residence around midnight and began pounding on the door. The family inside consisted of Mr. and Mrs. Leejay and their four children, Mrs. Heads (the wife of the appellant) and her three children. The appellant apparently circled the house beating on windows yelling for his wife to come talk to him but received no response from the inside of the house. He apparently left the residence, again called on the phone, allowing the phone to ring repeatedly, and returned to the residence and again began pounding on the door, ringing the doorbell and yelling for his wife to come outside.

Suddenly the appellant kicked open a carport door and entered the residence. The homeowner, the deceased in this case, stood in the doorway of his bedroom and repeatedly asked Heads to leave. The appellant refused to leave and brandished his .22 caliber pistol. At some point in the brief conversation between the deceased and the appellant, while the appellant was being asked and ordered to leave by the homeowner, the homeowner obtained an unloaded .25 caliber pistol. Suddenly, the appellant began firing his .22 caliber pistol down the hallway at the homeowner. He fired his pistol until it began to snap repeatedly, at which time he left the residence.

After the appellant had left the residence the children were placed at the bottom of closets in an effort to hide them from the appellant. The homeowner, Mr. Leejay, armed himself with a single shot .410 gauge shotgun. His wife called the police and neighbors were awakened.

The appellant did not leave the scene, but re-armed himself with his .22 caliber semi-automatic rifle which he had obtained from the trunk of his car which was parked in front of the Leejay residence. Upon returning to the house the appellant fired at least one shot through the window of a bedroom occupied by several children. He then re-entered the house through the door he had earlier kicked open and began firing with his .22 caliber semi-automatic rifle. The homeowner returned the fire by firing two rounds from his .410 gauge shotgun into a wall. The bird-shot from the shotgun struck the wall harmlessly as the defendant was apparently positioned against an opposite wall. As the appellant continued to fire his rifle at the deceased, a child ran across the hallway in the path of his fire. The deceased person, Mr. Leejay, yelled out, in an effort to stop the appellant's onslaught, that the appellant had shot one of his children but the appellant continued to fire. Mr. Leejay was shortly thereafter struck in the eye by a .22 caliber bullet which traveled through his brain killing him almost instantaneously.

During the exchange of gunfire, the appellant's wife and Mrs. Leejay had crawled out of the residence through a small bathroom window and had run to a neighbor's house for help. After killing Leejay, the appellant walked calmly to Leejay's body and picked up the shotgun. He then walked into one of the children's bedrooms and found several of the children huddled in the bottom of a closet. He ordered them out of the closet and stood them against a wall. He then leveled his rifle at the chest of Roy Leejay, Jr., and told the young child that unless he was told where his wife was he would kill all of the children in the house. The children began yelling that she was in the other room, at which time the defendant turned away from the children and began walking down the hallway of the house. At this time the police had arrived at the scene and several officers were in the process of entering the house. The

appellant was ordered three times to put down the two weapons that he was armed with. It was not until police officers leveled their weapons at him that he complied with their orders.

The police investigation found that Mr. Leejay, the deceased, had never loaded his .25 caliber pistol as a fully loaded clip was found under the bed in his bedroom. There was no evidence from an inspection of the gun that it had been fired, nor was there any evidence in the house of him firing his .25 caliber pistol.

The investigation revealed that Mr. Leejay had fired two rounds from his single shot .410 shotgun down the hallway into a sheetrock wall and that the shells were of "birdshot" load. The investigation revealed that the appellant had fired at least *ten* shots in the direction of the deceased. This was confirmed by expert firearms identification testimony matching bullets dug from the walls and doorfacing of the house to the pistol and rifle of the appellant and further by matching ejected .22 caliber hulls to the appellant's rifle. The bullet taken from the brain of the deceased was matched to the appellant's rifle.

The police investigation showed that after emptying his pistol, the appellant walked to his car parked in the front of the Leejay residence and obtained the .22 caliber semi-automatic rifle from the trunk of the car before returning to the house and firing the fatal shot. At least one neighbor saw the appellant walk to his car and obtain the rifle. The testimony was clear and uncontradicted that when the appellant left the residence the first time the victim was alive and well in his own house attempting to protect his wife and children.

After his arrest the appellant told police officers that his wife had left him several days earlier after an argument. He admitted breaking open the door and firing his pistol until it had emptied, returning to his car and arming himself with his rifle and returning to the house and resuming the fire. The

appellant told the police officers that before breaking into the residence he had decided that he would do whatever it took, even getting killed, to get his wife back.

LEGAL PROCEEDINGS

The appellant entered a plea of Not Guilty and Not Guilty by Reason of Insanity in response to a Grand Jury Indictment charging him with first degree murder. A Sanity Commission was appointed to examine the appellant and their findings were that the appellant was not suffering from any mental disease or defect at the time of the offense, that he was capable of understanding the nature of the charges and assisting his attorney, and that at the time of the offense the defendant clearly could distinguish right from wrong.

At trial the defense contended that the appellant was not guilty because he was insane at the time of the commission of the crime, and, alternatively, that if he was not insane, he was guilty only of manslaughter but not first or second degree murder.

After a trial lasting some eleven days, the jury unanimously convicted the appellant of the offense of first degree murder. After a separate sentencing hearing, the jury unanimously recommended that the appellant be sentenced to life imprisonment without benefit of suspension of sentence, probation or parole.

The appellant perfected an appeal to the Louisiana Supreme Court which unanimously affirmed the conviction. The defendant's motion for a rehearing before the Louisiana Supreme Court was denied on May 21, 1979. Notice of appeal to the United States Supreme Court was filed with the Louisiana Supreme Court on July 23, 1979. Between the time that the Louisiana Supreme Court affirmation became final (on the date the rehearing was denied) and the time the appellant perfected an appeal to the United States Supreme Court, the case of *Sandstrom v. Montana* was decided on June 18, 1979. ____ U.S. ____; 99 S.Ct. 2450 (1979).

On appeal to this Court, the defense attempts to raise for the first time the claim that *Sandstrom*, supra, governs the instant case. This stems from a challenge to a portion of the jury charge in the case at hand. Also presented on appeal is the contention that the Louisiana crime of manslaughter, as used in Louisiana statutory responsive verdict scheme, is unconstitutional due to the decision in *Mullaney v. Wilbur*. 421 U.S. 684; 95 S.Ct. 1881; 44 L.Ed.2d 508 (1975).

ARGUMENT AS TO QUESTION ONE PRESENTED BY APPELLANT

The appellant first contends that due to this Court's decision in *Sandstrom v. Montana*, supra, a portion of the Court's instructions to the jury constitutes a violation of the 14th Amendment's due process clause.

SUMMARY OF ARGUMENT AS TO QUESTION ONE

The State of Louisiana urges this Court to dismiss the appeal for the following reasons:

A. The question sought to be reviewed by this Court has not been expressly passed on by a lower court, and
B. *Sandstrom*, supra, is not retroactive and, alternatively,
C. If *Sandstrom* is applicable to the instant case, it is factually and legally distinguishable so as to allow the instant case to comply with the due process requirements of the 14th Amendment.

A. THE SANDSTROM ISSUE HAS NOT BEEN RAISED OR PASSED ON PREVIOUSLY.

As noted in the statement of the case the instant case became "final" as a matter of state law when the Louisiana

Supreme Court denied the appellant's motion for a rehearing on May 21, 1979. Approximately one month later, this Court decided *Sandstrom v. Montana*, supra. Approximately one month after the *Sandstrom* decision, the appellant filed his notice of intention to appeal the Louisiana Supreme Court's decision to the United States Supreme Court. This occurred on July 23, 1979.

The defense relies almost entirely on the *Sandstrom* decision in claiming that the Trial Court's instructions to the jury violated the due process clause of the 14th Amendment. The appellant has not pursued a review of this contention by any means, i.e., habeas corpus, other than by appeal to this Court. Therefore, as the *Sandstrom* issue has not been reviewed by any previous court the appellee moves this Court to dismiss Ground One of the appeal on the grounds that the federal question sought to be reviewed was not timely or properly raised in the State court and clearly has not been expressly passed on by any court at this time.

B. SANDSTROM IS NOT RETROACTIVE, and

C. IF RETROACTIVE, SANDSTROM IS DISTINGUISHABLE

In the event this Court should find the *Sandstrom* issue properly before it, the appellee contends that *Sandstrom* is not retroactive to the instant case.

The question of what rule governs in determining whether a judicial decision interpreting constitutional values is to be applied retroactively is not only easily answered due to the multiplicity of "rules" used by courts in determining when a judicial ruling will be held to be retroactive.

In *Linkletter v. Walker*, 381 U.S. 1618; 85 S.Ct. 1731 (1965), a brief historical discussion on the development and application of judicial rules relating to retroactivity was a part

of the Opinion by Mr. Justice Clark. In *Linkletter*, supra, the question was whether the rule of *Mapp v. Ohio*, 367 U.S. 643; 81 S.Ct. 684; 6 L.Ed.2d 1081 (1961), would be held to operate retrospectively. Evidence was used in the prosecution of Linkletter which apparently would have been excluded under the *Mapp* rule. A conviction was obtained partially on the basis of evidence which was seized in an unconstitutional fashion.

After discussing the various divergencies in civil and criminal cases addressing the question of retrospective application of judicial holdings, it was noted that in each of the areas where retrospective application had been allowed, the principle that was applied "went to the fairness of the trial — the very integrity of the fact-finding process." *Linkletter*, supra, at 381 U.S. 639; 85 S.Ct., 1743.

While it may be impossible to practically distinguish between unconstitutionally seized evidence being used as a basis of the prosecution effort as not affecting the "fairness" of the trial or not influencing the fact-finding body, the jury, the Court noted that the evidence attacked ". . . may well have had no effect on the outcome" of the trial. *Linkletter*, supra, 381 U.S., 369; 85 S.Ct., 1743. It was also noted that "After full consideration of the factors we are not able to say that the *Mapp* rule requires retrospective application." *Linkletter*, supra, 381 U.S., 640; 85 S.Ct., 1743. As will be shown, as was the case in *Linkletter*, supra, when all relevant factors are considered in the instant case, via *Linkletter* standards the *Sandstrom* rule should not be given retrospective application.

The problem of retrospective application was again addressed in *Hankerson v. North Carolina*, 332 U.S. 233; 97 S.Ct. 2339; 53 L.Ed.2d 306 (1977). In *Hankerson*, this Court determined that the case of *Ivan V. v. City of New York*, 407 U.S. 203; 92 S.Ct. 1951; 32 L.Ed.2d 659 (1972), controlled the question of whether *Mullaney v. Wilbur*, supra, should be

held retrospective, *Hankerson*, supra, 332 U.S., ____; 97 S.Ct., 2344.

In *Hankerson*, supra, this Court noted that *Ivan V.*, supra, *Mullaney*, supra, and *In re Winship*, 397 U.S. 358; 90 S.Ct., 1068; 25 L.Ed.2d (1970), all addressed the proposition that retrospective application will be made when the purpose was to overcome an aspect of a criminal trial that "substantially impairs the truth-finding function". *Hankerson*, supra, 332 U.S., 233; 97 S.Ct., 2344.

Concurring in the result in *Hankerson*, supra, Mr. Justice Powell suggested that it would be proper for the Court to adopt Mr. Justice Harlan's approach to the retroactivity question as stated in *Mackey v. United States*, 401 U.S. 667; 91 S.Ct. 1160; 28 L.Ed.2d 404 (1971), in his separate Opinion in that case. The *Linkletter* "integrity of the fact-finding process" rule has been followed by the Louisiana Supreme Court in determining whether or not new judicial interpretations require retroactive application. *City of Baton Rouge v. Short*, 345 So.2d 37 (1977), at page 40. Thus, it can be seen that "What the rule is" regarding retrospective applications of new judicial opinions interpreting the constitutionality of statutes is unclear at best. As will be shown in the appellee's discussion distinguishing *Sandstrom*, both factually and legally from the instant case, the same distinguishing features relate to and cause *Sandstrom* not to be retroactive to the instant case.

We must first seek to distinguish *Sandstrom*, supra, from the instant case in the most basic fashion: the facts of the two cases and the statutes of the respective states as applied in each trial cause these cases to be inconsistent with the proposition of restrospective legal application.

In the instant case, the appellant was observed by numerous witnesses circling the house of the victim, breaking into the house and firing shots at the victim. At least ten shots were

fired at the victim and various bullets and holes were matched to each of the appellant's two weapons. The bullet taken from the brain of the deceased was matched in particular to the appellant's .22 caliber semi-automatic rifle. After making the initial forced entry into the victim's residence and after emptying a .22 caliber pistol by firing it at the victim, the appellant then left the residence for several minutes, went to his automobile parked in front of the residence, re-armed himself with another weapon and then returned to continue his attempt to take the life of the victim. During both assaults on the victim the victim pleaded with the appellant to leave the house. The appellant was successful in killing the victim by shooting him through the eye with a bullet from his rifle. The appellant then lined several children up against a wall and threatened to kill them if they did not give him the information he wanted and, as he was in search of another person in the house, was arrested by several officers within feet of the person he had just murdered. The appellant admitted to officers that he killed the victim and that he intended to do whatever was necessary to get his wife back, including getting himself killed if that was necessary.

The defense in *Sandstrom*, supra, involved the testimony of two court-appointed mental health experts who testified as to the defendant's mental state at the time of the incident. This was presened to the jury as being in a state of disorder due to extreme alcohol consumption, thus negating a killing committed "purposely or knowingly" as was required for conviction of "deliberate homicide" under the Montana statute. Thus, there was no "insanity" defense offered in *Sandstrom* as was the case here, but rather a diminishment of mental responsibility due to alcohol consumption which in turn allegedly affected Sandstrom's ability to "purposely or knowingly" commit the crime charged. *Sandstrom*, supra, ____ U. S., ____; 99 S.Ct., 2453.

In the instant case there was no defense which related to the consumption of alcoholic beverages. Two psychiatrists testified that the defendant *was able to* distinguish right from wrong at the time of the offense.

The respective statutes of the States of Montana and Louisiana are completely different in their requirements of certain mental elements for the commission of various grades of homicide.

In *Sandstrom*, supra, the statutes in question provided:

94-5-101. Criminal Homicide.

(1) A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.

(2) Criminal homicide is deliberate homicide, mitigated deliberate homicide or negligent homicide.

94-5-102. Deliberate Homicide.

(1) Except as provided in 94-5-103(1)(a), criminal homicide constitutes deliberate homicide if:

(a) it is committed purposely or knowingly . . . (*Sandstrom*, supra, ____ U.S., ____, 99 S.Ct., 2453, footnote 1).

Sandstrom initially filed a notice of intent to rely on a mental disease or defect which would exclude criminal responsibility as a defense to the charge. Montana law required that the defendant be shown to be unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. However, Sandstrom *withdrew that defense* at trial and contended only that he did not purposely or knowingly commit the killing and thus could not be guilty of deliberate homicide. *Sandstrom*, supra, ____ U.S., ____; 99 S.Ct., ____.

In the instant case, the defendant Heads entered a plea of Not Guilty and Not Guilty by *Reason of Insanity* and pursued

this defense at trial as an alternative theory presented to the jury. Heads contended that (1) he was not guilty of the offense as he was insane at the time it was comitted or, (2) if he was not insane then the offense committed was only manslaughter, not murder.

Louisiana law governing the Heads case is, and was given to the jury, as follows:

Louisiana R.S. 14:30.

First Degree Murder is the killing of a human being when the offender had the specific intent to kill or to inflict great bodily harm.

Louisiana R.S. 14:10.

Criminal intent may be specific or general:

(1) Specific Criminal Intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.

(2) General Criminal Intent is present whenever there is specific intent and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have averted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.

The responsive verdicts as given to the jury were as follows:

Louisiana R.S. 14:30.1.

Second Degree Murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

Louisiana R.S. 14:31.

Manslaughter is a homicide which would be murder under either Article 30 (First Degree Murder) or Article 30.1 (Second Degree Murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

A homicide committed, without any intent to cause death or great bodily harm,

(a) When the offender is engaged in the perpetration of any felony not enumerated in Article 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) The offender is resisting a lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are so as the killing would not be murder under Articles 30 or 30.1.

Louisiana R.S. 14:60. Aggravated burglary (felony).

Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure, watercraft, or movable where a person is present, with the intent to commit a felony or any theft therein, if the offender

(1) Is armed with a dangerous weapon; or

(2) After entering arms himself with a dangerous weapon; or

(3) Commits a battery upon any person while in such place, or in entering or leaving such place.

Louisiana R.S. 14:27. Attempt.

(A) Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

(B) Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.

Louisiana R.S. 14:11.

The definitions of some crimes require a specific intent, while in others no intent is required. Some crimes require a specific intent, while in others no intent is required. Some crimes consist merely of criminal negligence that produces criminal consequences. However, the absence of qualifying provisions, the terms "intent" and "intentional" have reference to "general criminal intent".

Louisiana R.S. 14:14.

If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility.

(All of the foregoing was taken directly from the charge given to the jury in this case contained at Volume I, Minutes, pages 53, 54, 58, 60, 61 and 62.)

Thus, the differences between the Montana statute and the Louisiana statute are obvious. The intricacies of potential

responsive verdicts under the Louisiana statutory scheme are too numerous to discuss at this time but it suffices to say that even if the jury were to determine from the facts that the defendant did not have a specific intent to commit the crime of first degree murder, even if he had no intent to kill, the evidence clearly established he committed an aggravated burglary and thus the killing of the victim would have constituted at least second degree murder under the fact. However, the jury rejected the defendant's contention because the *circumstances* indicated that the offender had the specific intent to kill because *circumstances* excluded the responsive verdict of manslaughter and because the *circumstances* did not indicate that any mental disease or defect prevented the defendant from distinguishing right from wrong at the time of the crime. We must thus determine whether the complained of charge in *Sandstrom* has an effect there which "substantially impairs the truth-finding function" when compared with the facts and the law in the instant case so as to cause *Sandstrom* to be both retroactive to the instant case and to cause the same effect here that was found to be present in *Sandstrom*.

The appellant contends that *Sandstrom* governs the instant case because of a similarity of a phrase taken from the *Sandstrom* jury charge, "The law presumes that a person intends the ordinary consequences of his voluntary acts", and the phrase contained in the charge in the instant case, "A man is presumed to intend the natural and probable consequences of his acts." The statutes of each case having already been discussed, we must now examine the charge as a whole, in pertinent part, as it was given to the jury in the instant case. In addition to the portions of the charge already cited, the judge charged the jury in pertinent part as follows:

> The jury in this case is the judge of the law as given to you and of the facts of the question of guilt or innocence of the accused. Your determination of the facts must be based

> on evidence adduced in open court. The evidence upon which you can base your determination consists of the testimony of the various witnesses, documents received in evidence and exhibits received in evidence on this case.
>
> You must base your conclusions upon the evidence presented.
>
> It belongs to you, the jury, and to the jury alone, to determine the weight and credibility of the evidence.
>
> I charge you that the fact an accused stands before you charged with a crime creates no presumption against him. The charge is a mere accusation against him.
>
> To begin with, every person in this state accused of crime is presumed by law to be innocent until his guilt shall have been established beyond a reasonable doubt in trial. The burden is upon the State to prove every essential element of the crime charged. However, this does not mean that the State must prove beyond a reasonable doubt such facts which may be connnected with the crime charged but which are not essential elements thereof.
>
> It is the duty of the jury, in considering the evidence and in applying to that evidence the law as given by the Court, to give the defendant the benefit of every reasonable doubt arising out of the evidence or want of evidence in the case. If you are not convinced of the guilt of the defendant beyond a reasonable doubt, it is your duty to find him not guilty.
>
> A presumption of innocence is another way of saying that a person is not guilty until proved otherwise beyond a reasonable doubt. A legal presumption relieves the person in whose favor it exists from the necessity of any proof whatsoever. Nevertheless, a presumption may be destroyed by evidence to the contrary. In other words, the defendant in this case need not prove his innocence. It is incumbent on the State to prove his guilt beyond a reasonable doubt; and, until so proved, an accused is presumed to be innocent. If after you have considered the State's evidence and the law applicable, there is doubt in your mind as to the guilt

of the accused, which doubt is based upon a reason, or for which doubt you can express a reason, then the defendant is not guilty. Reasonable doubt is rational. It is governed by reason. It is not immoderate or excessive. It is honest, equitable and fair.

It is your duty to determine the weight and credibility of evidence. You may take into consideration the probability or improbability of the statements of the witnesses, their opportunities for knowledge of the facts to which they testify, the reliability and noting and remembering facts, their demeanor on the stand, the interest or lack of interest they may have shown in the case, and every circumstance surrounding the giving of their testimony which may aid you in weighing their statements. If you believe that any witness in the case, either for the State or for the defense, has willfully and deliberately testified falsely to any material fact for the purpose of deceiving you, then you are justified in disregarding the entire testimony of such witness as proving nothing and is not worthy of belief. You have the right to accept as true or reject as false the testimony of any witness, in whole or in part, as you are impressed with his veracity.

In weighing the evidence, you may determine that two different reasonable conclusions may be drawn from the evidence. Whenever facts, testimony or other evidence are such that two different conclusions may reasonably be drawn therefrom, one conclusion favorable to the defendant and the other conclusion not favorable to him, I charge you that it is your duty to draw the conclusion that is favorable to the defendant.

I further charge you that the burden is not upon the accused to prove that he acted in self-defense. It is upon the State to prove beyond a reasonable doubt that the killing was feloneous and criminal and was not therefore done in self-defense.

Although intent is a question of fact, it not need be proven as a fact, and may be inferred from the circumstances of the transaction. Specific criminal intent is that state of

mind which exists when the circumstances indicate that the offender actively desired and actually intended to accomplish the criminal consequences constituting the crime charged. This intent need not be proven by direct evidence. It is not possible to look into the person's mind and discover his intention. It may be inferred from the circumstances. A man is presumed to intend the natural and probable consequences of his act. The intent need not have existed for any material length of time. It is sufficient if it was in the mind of the accused at the time of the commission of the act. You may consider all of the evidence in the case which you believe bears on the question of the intent of the defendant in order to reach a conclusion as to his criminal intent.

In this case there was a plea of not guilty by reason of insanity at the time of comitting the act. Every person is presumed to be sane. Therefore, while the State, in making its case, must establish the guilt of the accused beyond a reasonable doubt, when insanity is set up as a defense it must be established by the defendant to the satisfaction of the jury. In order to overcome the presumption of sanity and relieve the defendant from legal responsibility when he relies upon his insanity as an excuse for a criminal act, he must establish such insanity to the satisfaction of the jury by a preponderance of the evidence. A preponderance of the evidence does not mean a preponderance of witnesses, but it means that, taking all the evidence into consideration, the weight and effect of it is to satisfy your mind that at the time of the commission of the crime the defendant was insane. It is for you and you alone to pass judgment upon this plea of insanity. You are the sole judges of how much weight you will give the expert testimony, the non-expert testimony and any documentary evidence, together with all facts brought out on the trial of the case. In other words, a plea of insanity presents a question of fact to be decided by you as any other fact in the case.

Even though a defendant be sane before and after the commission of a crime, if he is insane at the time of the

commission of the crime, he is exempt from criminal responsibility.

(Taken directly from the Court's charge to the jury, Volume I, minutes, pages 45-66.)

In the appellant's jurisdictional statement, the Opinion of the Louisiana Supreme Court at pages 6a through 8a discusses Assignment of Error No. 20, Argument No. VI. The State Court cites appropriate authority for the proposition that the charge must be considered as a whole to determine whether the jury instruction complained of was erroneously included. See also *Cupp v. Naughten*, 414 U.S. 141, 147; 94 S.Ct. 356, 400; 38 L.Ed.2d 368 (1973). The State Court notes that when taken as a whole the charge could not have created any confusion in the minds of jurors as to the requirement that the State must prove each essential element of the crime charged, first degree murder, including the element of specific intent, beyond a reasonable doubt.

It is important to note that the complained of portion of the charge comes from Louisiana Revised Statutes 15:432 which in pertinent part was given to the jury in this Court's charge clearly stating that ". . . a legal presumption relieves him in whose favor it exists from the necessity of any proof; but may nonetheless be destroyed by rebutting evidence; such is the presumption . . . that the defendant intended the natural and probable consequences of his act . . . that the defendant is sane . . . that the defendant is innocent . . .". As noted by the Louisiana Supreme Court the offense which the defendant was charged with committing and which he was convicted of requires proof beyond a reasonable doubt that he had a "specific intent" which is, as defined for the jury, ". . . that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consquences to follow his act . . .". Louisiana Revised Statutes 14:10. The State Supreme Court noted that the instruction pertained to the definition of specific

intent, its formation, and its proof by surrounding circumstances and further, that the disputed portion of the charge was general in nature and was preceded and followed by accurate instruction relative to specific intent. See *Opinion*, Louisiana Supreme Court, Appellant's Jurisdictional Statement, page 8a.

It is important to note that in *Sandstrom* there was no requirement that the State prove that the defendant had "specific intent" but only that the homicide committed was committed "purposely or knowingly". As Louisiana law requires that the circumstances indicate that the offender at the time the crime was committed actively desired the prescribed criminal consequences to follow his act, the effect on the jury by being told within the context of the entire charge to the jury explaining intent that "A man is presumed to intend the natural and probable consequences of his acts" is substantially different from the jury in *Sandstrom* being told that "*The law* presumes that a person intends the ordinary consequences of his voluntary acts" when such presumptions are contrasted to the specific law governing each respective case and each respective charge as a whole.

The pertinent portions of the charge to the jury in the instant case have been reproduced in this brief for the Court's review. As was noted in *Ulster County Court v. Allen*, ____ U.S. ____; 99 S.Ct. 2213, 2224-2227 (1979), a threshhold inquiry is to determine the "nature of" any presumption given to a jury in a Court's instruction. This is to say, is the presumption "conclusive", "permissive", "burden lifting", and is it constitutional in a due process sense. It was also noted that such determination requires a careful attention to the words actually spoken to the jury.

In *Sandstrom*, it was noted that the jury was not told that the presumption there could be rebutted by the simple presentation of "some" evidence nor was the jury instructed

that the presumption should be rebutted at all. *Sandstrom*, supra, ____ U.S. ____, ____; 99 S.Ct., 2455-2456. It must be noted that, in the reading of the charge as a whole in the instant case, as previously cited, the jury was instructed that:

> You must base your conclusions upon the evidence presented.
>
> It belongs to you, the jury, and to the jury alone, to determine the weight and credibility of the evidence.
>
> I charge you that the fact that the accused stands before you charged with a crime creates not presumption against him.
>
> . . . every person in this state accused of crime is presumed by law to be innocent until the guilt shall have been established beyond a reasonable doubt . . . The burden is upon the State to prove every essential element of the crime charged . . .
>
> It is the duty of the jury . . . to give the defendant the benefit of every reasonable doubt arising out of the evidence or want of evidence . . .
>
> A legal presumption relieves the person in whose favor it exists from the necessity of any proof whatsoever. Nevertheless a presumption may be destroyed by evidence to the contrary. In other words, the defendant in this case need not prove his innocence.
>
> Whenever facts, testimony or other evidence are such that two different conclusions may reasonably be drawn therefrom, one conclusion favorable to the defendant and the other conclusion not favorable to him, I charge you that it is your duty to draw the conclusion that is favorable to the defendant.
>
> I charge you that the burden is not upon the accused to prove that he acted in self-defense. It is upon the State to prove beyond a reasonable doubt that the killing was felonious and criminal and was not therefore done in self-defense.

> You may consider all of the evidence in the case which you believe bears on the question of intent . . .

Contrary to the Court's conclusion reached in *Sandstrom*, the respondent submits that there is no reasonable possibility that the jury may have interpreted the instructions given it by the Court as "conclusive" or as "burden shifting".

Even if the charge to the jury states words to the effect that a legal presumption may exist in one's favor but may be destroyed by evidence to the contrary, the "evidence" in a case includes the *entire* presentation of evidence by the State as well as by the defense. The State's "evidence" may serve to support a contention of the defense. In the instant case, the State presented to the jury the facts of the occurrence which were essentially undisputed by the defense. The defense then coupled with the facts presented to the jury by the State its argument that the facts themselves showed the defendant was "temporarily insane". Thus, it is not reasonable to conclude that any portion of the charge given placed any burden on the defense to "disprove" the existence of the requisite type of criminal intent. The charge itself as cited, supra, is to the contrary.

The charge in the instant case is clearly not "conclusive" as such is defined as being one ". . . which testimony could not overthrow . . ." and which "would effectively eliminate intent as an ingredient of the offense . . ." *Morisett v. United States*, 342 U.S., 246, 274-275; 72 S.Ct. 240, 255-256; 96 L.Ed.288 (1952). Further, as the charge in *Sandstrom*, supra, and the charge in *United States v. United States Gypsum*, (cite to follow) was that "*The law* presumes . . ." (emphasis added) and the instant case was only that "A man is presumed . . .". *Sandstrom*, ____ U.S., ____; 99 S.Ct., 2455; *United States v. United States Gypsum*, 438 U.S. 422, 430; 98 S.Ct. 2864, 2869; 57 L.Ed.2d 854 (1978). The instant case carries with it no ". . . legal presumption of wrongful intent . . ." and the jury

was clearly instructed that it ". . . must remain free to consider additional evidence before accepting or rejecting the inference . . ." and that ".' . . the decision of the issue of intent must be left to the trier of fact alone." *Gypsum*, supra, 438 U.S., 435, 446; 98 S.Ct., 2872, 2878. Contrary to the conclusion reached in *Sandstrom* that "The State was thus not forced to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged", the jury in the instant case was specifically instructed to the contrary. *Sandstrom*, supra, ____ U.S. at ____, 99 S.Ct. at 2459; *In re Winship*, 397 U.S. 358 at 364; 90 S.Ct. 1068 at 1073; 25 L.Ed.2d 368 (1970). It is submitted that the jury in the instant case, unlike the jury in *Sandstrom*, could not reasonably "have interpreted the judge's instructions as constituting either a burden shifting presumption like that in *Mullaney*, or a conclusive presumption like those in *Morissett* and *United States Gypsum* . . .". *Sandstrom*, supra, ____ U.S., ____; 99 S.Ct., 2459.

It must also be noted that the complained of portion of the jury charge relative to intent occurs in the charge in a paragraph immediately preceding a portion of the charge to the jury dealing with the defendant's plea of not guilty by reason of insanity. Thus, unlike the case in *Sandstrom*, the instant case has additional elements, i.e., the defendant's sanity at the time of the commission of the crime which is governed by law that presumes a defendant sane until he proves otherwise by preponderance of the evidence. That portion of Louisiana law is not objected to and is not before this Court. The jury in the instant case was not instructed as to any presumptions of "*criminal*" intent but was merely instructed prior to receiving instructions pertaining to the law of insanity that "A man is presumed to intend the natural and probable consequences of his acts". (All references to and quotations of the charge to the jury in the instant case have previously been cited.)

The respondent submits that the overall circumstances in the instant case closely fit those and are governed by this Court's decision in *County Court of Ulster County v. Allen*, supra. There, Mr. Justice Stevens writing for the majority noted that "Inferences and presumptions are a staple of our adversarial system of fact-finding" and that ". . . in criminal cases, the ultimate test of any device is constitutional validity and a given case remains constant: the device must not undermine the fact-finder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Ulster Counyt*, supra, ____ U.S., ____; 99 S.Ct. 2224.

In *Ulster*, the distinction is made between permissive inferences or presumptions and those which are conclusive or mandatory. It is noted that mandatory or conclusive presumptions usually create a burden shifting situation which places on the defendant the obligation to disprove that which is otherwise presumed. It was noted in *Ulster* that the Trial Court's instructions to the jury were such that the presumption used was to be viewed by the jury within the context of all the facts in the case, other instructions of the law, and that the mandatory presumption of innocence prevailed unless the trier of fact was satisfied beyond a reasonable doubt that the defendants had been proven guilty in the manner described by the Court. The instructions also plainly directed the jury to consider all circumstances tending to support or contradict the inference without regard as to how much evidence the defendants had introduced. This Court concluded an evaluation of *Ulster* in determining that the presumption used "As applied to the facts of this case . . ." was entirely rational. The Court noted that "The application of the statutory presumption in this case therefore comports with the standards laid down in *Tot v. United States*, 319 U.S. 463, 467; 63 S.Ct. 1241, 1244; 87 L.Ed.2d 1959 and restated in *Leary v. United States*, 395 U.S. 6, 36; 89 S.Ct. 1532, 1548; 23 L.Ed.2d 57 (1969), for there is a 'rational connection' between

the basic facts that the prosecution proved and the ultimate facts presumed, and the latter is 'more likely than not to flow from' the former." *Ulster County*, ____ U.S., ____, 99 S.Ct. 2228. (Substantive excerpts appearing hereinabove taken from *Ulster County*, ____ U.S., ____, ____; 99 S.Ct. 2218-2229.)

Mr. Chief Justice Berger noted in his concurring opinion in *Ulster County*, supra, that "On this record, the jury could readily have reached the same result without benefit of the challenged statutory presumption . . .". ____ U.S., ____; 99 S.Ct., 2230.

The presumption in *Ulster County* was a statute which provided that with certain exceptions, the presence of a firearm in an automobile would be presumptive evidence of the illegal possession of the firearm by all persons then occupying the vehicle. Certiorari was granted to determine whether the statute was constitutional as applied to the respondents, three adult males who accupied a car along with a 16-year-old girl. All occupants of the car were convicted of possessing the weapons within the car after the trial judge had instructed the jury that they were entitled to infer possession of the weapons from the fact of the defendant's presence in the car. *Ulster County*, supra, ____ U.S. ____; 99 S.Ct. 2217-2218.

CONCLUSION AS TO APPELLANT'S QUESTION ONE CONTENTION

Considering the governing cases discussed herein and the facts of the instant case as compared with those cases cited and discussed, the respondent herein submits that in the instant case there is no substantial federal question upon which to justify this Court granting jurisdiction in this case and the federal question raised, though unsubstantial, has not been expressly passed on by a lower court. Rule 16 1(b), Supreme Court of the United States.

ARGUMENT AS TO QUESTION TWO PRESENTED BY APPELLANT

The essence of the appellant's contentions here are that the Louisiana statutory scheme shifts the burden of proof to the defendant to show a homicide comitted was manslaughter rather than one of the two higher grades of homicide, i.e., first or second degree murder. The appellant attempts to skillfully combine the actualities of Louisiana law and the instructions given the trial jury with a theoretical argument that stems from this Court's holding in *Mullaney v. Wilbur*, 421 U.S. 684; 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). *Mullaney* interpreted certain Maine statutes which clearly placed on the defendant a burden of proof in showing to a jury that a homicide committed was manslaughter, not murder. It is submitted that respondent has misinterpreted this Court's decision in *Mullaney* and in the other authorities cited as it attempts to apply these authorities to the instant case. Further, the appellant continues to argue its interpretation of the Louisiana manslaughter which is patently erroneous as the appellant continually refuses to acknowledge all elements of the law that must be present before the law is applied to a given set of facts.

The respondent, the State of Louisiana, has previously cited in great detail the charge given the jury in this case which clearly sets forth all elements of the Louisiana definitions of first and second degree murder, manslaughter and various related crimes which may apply to both second degree murder and manslaughter.

Mullaney, supra, placed before this Court the following *issues*:

> . . . whether the main rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process. 421 U.S., 692; 95 S.Ct., 1886.

The jury in *Mullaney* was instructed that:

> . . . if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation.

The murder and manslaughter statutes in Maine can be stated briefly, as they existed at the time of the trial in *Mullaney*, supra, as reflected at 421 U.S., 686; 95 S.Ct., 1883:

> Murder: Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.
>
> Manslaughter: (relevant part) Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than twenty years . . .

Thus, the damage done to a defendant's presumption of innocence by the instruction given in *Mullaney* is obvious. As no such instruction was given in the instant case, the cases are readily distinguishable. Further, Louisiana law is substantially different from the Maine statutes which governed in *Mullaney*.

In the instant case, the defendant was prosecuted for the first degree murder. The jury had as responsive verdicts, the crimes of second degree murder and manslaughter which the jury could apply if it found the facts supported either of those statutes. The jury in the instant case was charged as to these statutes by the Court. Included in his charge was the entire definition of each statute with appropriate definitions of terms used in the statutes and definitions of related offenses. Appellee has previously cited in detail the pertinent governing portions of the charge given to the jury in this case and this Court is respectfully referred to the entirety of the charge as previously cited.

For purposes of brevity, such charges will not be repeated here. Please see appellee's brief, supra, pages 13-20, 22.

One way to determine whether the *Mullaney* rule was violated here is to examine the counsel for the respondent's erroneous interpretation of the manslaughter statute as it exists in Louisiana. Louisiana's manslaughter statute in essence provides that the jury may convict a person of manslaughter who is charged with first degree murder if the jury finds that the facts in the case show that the homicide committed in the case would be murder under either the first or second degree murder provisions but the offense was committed, 1) in sudden passion or heat of blood that, 2) was immediately caused by a provocation that, 3) was sufficient to deprive an average person of his self-control and cool reflection. The legal proviso is that, 4) provocation shall not reduce a murder to manslaughter if the jury finds that the offender's blood had actually cooled *or* that an average person's blood would have cooled at the time the offense was committed. It is important to note that *all* of these pertinent factors must be present before there will be a factual basis to reduce a murder to manslaughter. Further, the legal proviso in the instant case would clearly exclude a true factual basis from existing to justify a manslaughter conviction as the defendant here emptied one gun in an attempt to kill his victim, then left the scene of the shooting to re-arm himself and returned several minutes later with yet another gun before ultimately killing his victim. Thus, the legal proviso set forth in Louisiana's manslaughter statute serves as a sufficient legal basis for the jury to reject the defendant's contention that the murder he committed was only a manslaughter. (Manslaughter is defined by Louisiana Revised Statute 14:31 and is set forth in this brief at Page__, supra.)

As is shown by the charge given the jury in the instant case, any burden shifting instruction to the jury is simply nonexistent in the instant case. In Louisiana, manslaughter is not

properly termed or applied as an affirmative defense. However, manslaughter may be argued to have been shown to exist from the circumstances proven to exist by the State in its attempt to prove to the jury that the facts justify a murder conviction. Even if it were an affirmative defense, this Court has recently held:

> We thus decline to adopt as a constitutional imperative, operative country-wide, that a state must disprove beyond reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.
>
> We therefore will not disturb the balance struck in previous cases holding that the due process clause requires the prosecution to prove beyond reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. The proof of the non-existence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.
>
> *Patterson v. New York*, ____ U.S. ____, ____; 97 S.Ct. 2319, 2327 (1977).

In the instant case, the charge cited previously clearly reveals that there was no burden to be carried by the defense in showing to the jury that the murder committed was only a manslaughter. As was the case in *Patterson*, supra, as noted at ____ U.S., ____; 97 S.Ct., 2322 (footnote 5), the Trial Court's instructions in the instant case as did the Trial Court's instructions in *Patterson*, that is, ". . . focused emphatically and repeatedly on the prosecution's burden of proving guilt beyond a reasonable doubt".

Louisiana's interpretation and application of manslaughter in relation to a charge of murder has been thoroughly discussed by the State Supreme Court in *State v. Peterson*, 290 So.2d 307 (1974). It should be noted that the Louisiana statu-

tory scheme of first and second degree murder and manslaughter as defined in the instant case were slightly different at the time *Peterson* was tried but at all times in Louisiana since 1942 when the State Criminal Code was adopted, manslaughter has been a responsive verdict to the crime of "murder" or, in more recent times, to the charge of "first degree murder" or "second degree murder". See Louisiana Criminal Code, as adopted in 1942; Louisiana R.S. 14:30, 30.1, 31; Louisiana Code of Criminal Procedure Articles 814, 859(2). In *Peterson*, Louisiana Supreme Court stated at pages 310-311 of that decision:

> All elements of the two crimes, murder and manslaughter, are identical; there exists only one difference; That is, the statutory definition of manslaughter provides that the killing, which would be murder under 14:30(1) be "committed in sudden passion of heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. If *passion* reduces a homicide requiring the same scinter, specific intent, from murder to a less serious crime, manslaughter, then *lack of passion* may realistically be seen as the additional element which elevates a manslaughter to murder. The presence of passion, however, is in the nature of a defense and, for this reason, the additional "element" of lack of passion need not be proven by the State in a murder prosecution. Therefore, the presence of passion is not an additional element of the crime of manslaughter; rather, it is a factor which exhibits a great degree of cupability less than that present when the homicide is committed caused by provocation.
>
> Additionally, a review of our manslaughter statute reveals that the "sudden passion" or "heat of blood" provisions operate in a mitigatory fashion in a murder prosecution, not a great deal unlike revisions in the criminal law of other jurisdictions where such factors are considered to be "affirmative defenses" to a charge of murder. Our manslaughter statute, R.S. 14:31 provides ". . . provocation shall not *reduce* a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that

an average person's blood would have cooled, at the time the offense was committed . . .".

. . . in this jurisdiction "passion" may be inferred by the jury from the evidence adduced upon trial by the State, there being no requirement in our law that these factors be affirmatively established by the defendant. Nevertheless, it is instructive to view this factor, which in our jurisdiction is solely within the province of the jury as ultimate judges of law and fact, as a factor in the nature of the defense to the crime of murder.

It is demonstrated, therefore, that a verdict of manslaughter may readily be seen as responsive to a charge of murder, and without resort to review of the evidence as is done by some other jurisdictions. In Louisiana, when there is evidence to prove the greater offense, it is the jury's province to determine the existence vel non of the lesser culpability and exercise the statutory right to return the manslaughter verdict. (Emphasis as supplied by Louisiana Supreme Court.)

Thus, it can be seen that in Louisiana there is no burden shifting statutory scheme as was the case in *Mullaney*, supra. This Court's recent decision in *Patterson*, supra, truly governs the appellee's position that the State need not disprove the existence of facts which may arguably support a conviction for a lesser and included offense, especially where such lesser and included offense is not statutorily set forth to the jury in a scheme which causes it to be an affirmative defense as was the case in *Patterson*.

In respondent's brief, the claim is made that the trial jury was never instructed what the essential elements of the crime of first degree murder were. See respondent's brief, page 20. It is not clear what is meant by this claim but the record of this case will reveal that no request was made of the trial judge to define for the jury in any different manner than was done what the essential elements of first degree murder were. Without

question, Louisiana's first degree murder statute was given to the jury "word for word" with sufficient detailed explanation as to the definitions in certain words and phrases contained in that statute to assist the jury in understanding their meaning. The defense simply never requested a "one-two-three-four" type instruction which *properly* stated Louisiana law. All requested special instructions were complete distortions of the law in Louisiana as all attempted to bring into the instruction the incorrect law that the State must disprove that the defendant committed manslaughter. Such requested charges were refused by the Trial Court on the grounds that they failed to adequately and accurately state the law and this refusal has been affirmed by the Louisiana Supreme Court.

It should be noted that at page 23 of respondent's brief *State v. Peterson*, supra, is cited in a very confusing context. Appellant would have this Court believe that Louisiana law does not place on the State the burden of proving the essential elements of first degree murder beyond a reasonable doubt. Nothing could be further from the actualities of the trial at hand as is indicated by the charge to the jury as set forth in this brief previously. The appellant totally misstates the holding of *Peterson*, supra, at page 23 of his brief and totally ignores the comparison being made of Louisiana and Connecticut law in the *Peterson* decision itself.

Without question, Louisiana law is (and was so instructed to the jury in the instant case) that the State must prove beyond a reasonable doubt each essential element of the crime of first degree murder before the jury can convict on that charge. Any contention to the contrary cannot be and is not supported by reference to the record in the instant case.

The State submits that the charge when viewed as a whole clearly establishes that the appellant in this case was afforded a fair trial which comports with the 14th Amendment's

due process clause. *Mullaney v. Wilbur*, supra, is distinguishable from the instant case. Louisiana law does not shift any burden to the defense causing the defense to show a jury by testimony or evidence that a murder committed was only manslaughter. The entire burden of proof rests on the State to show the jury that the facts support a conviction for first degree murder but it explains within the jury's province to return responsive verdicts of second degree murder or manslaughter if the facts so support such a finding.

CONCLUSION AS TO QUESTION TWO

The appellee, the State of Louisiana, submits that the appeal in this case should be dismissed as there is no substantial federal question upon which to note jurisdiction. Rule 16 1(b), Supreme Court of the United States.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that all parties required to be served have been served, that three copies of this Motion to Dismiss Appeal have been mailed, first class postage prepaid, to Mr. Wellborn Jack, Jr., counsel for appellant, 1109 Slattery Building, Shreveport, Louisiana 71101, and that I am a member of the Bar of this Court representing the party in behalf of whom service has been effected.

Shreveport, Louisiana, this ____ day of _____, 1979.

B. WOODROW NESBITT, JR.